IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Marian B. Pringle, *Petitioner,* *vs.* Commissioner of Internal Revenue, *Respondent.*	6034
Phyllis B. Brunson, *Petitioner,* *vs.* Commissioner of Internal Revenue, *Respondent.*	6035

PETITIONERS' OPENING BRIEF.

RAYMOND W. STEPHENS,
JOSEPH D. PEELER,
California Bank Bldg., 629 S. Spring, L. A.,
Attorneys for Petitioners.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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PETITIONERS' OPENING BRIEF.

STATEMENT OF THE CASE.

Questions Involved and How Raised.

Each of these cases comes to this court on a petition to review the decision and order of the United States Board of Tax Appeals, sustaining the Commissioner in the determination of a tax deficiency against each petitioner amounting to $3,293.85, in respect to income for the year 1923.

The proceedings before the Board arose under petitions filed by the petitioners for redetermination of the Commissioner's proposed deficiencies, each in the above amount. The cases were there consolidated and disposed of in one decision. [Tr. p. 14 *et seq.*]

The facts and questions in the two cases are identical. On stipulation of the parties and by order of this court [Tr. p. 47 *et seq.*] the cases have been consolidated for hearing and determination here, provision having been made by such stipulation for one printed transcript to serve in both cases.

The proposed deficiencies rested solely upon alleged gains from sales of certain realty made by petitioners within seven days after fee simple title thereto had vested in them. Such title vested on July 25, 1923, by virtue of a devise upon conditions precedent contained in the will of their mother, who died August 7, 1914. During the period between August 7, 1914, and July 25, 1923, an estate of the nature hereinafter pointed out in said realty had been held by trustees under a devise in said will. Upon the expiration of the trustees' estate on June 25, 1923, fee title was taken by petitioners as devisees under the will and by virtue of a devise upon conditions precedent, which conditions were not performed until July 25, 1923.

The Commissioner's contention, sustained by the Board, is that petitioners acquired the property upon the death of the decedent in 1914 and that the appreciation in value between that date and the dates of sales constituted gain taxable to petitioners.

Petitioners contend that July 25, 1923, constituted the acquisition date, and that since, as stipulated and found [Tr. p. 23], there was no increase between that date and the times of sale, no taxable gain was realized by them.

The disposition of these cases, therefore, involves only:

(a) A consideration of the terms of the will and the statutes and decisions of California to determine the nature and extent of the rights in said realty taken (1) by the trustees and (2) by petitioners; and

(b) The construction and application of section 202 of the Internal Revenue Act of 1921, which provides that in determining gain or loss resulting from sale of *"property"* acquired by devise, the basis shall be the value "at the time of such acquisition."

The ultimate question to be answered is:

When, within the meaning of such section, did the petitioners *acquire* the realty here involved?

If the realty was acquired in 1914, the order of the Board must be affirmed. If acquired in 1923, the order must be reversed.

The relevant portions of section 202 are quoted by the Board at transcript, page 24, as follows:

> "Section 202 of the Revenue Act of 1921 provides, in part, as follows:
>
> "(a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that:

"(3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition. * * *"

STATEMENT OF CASE (Continued).

Facts.

The will of the decedent appears in full in the findings of the Board [Tr. p. 16 *et seq.*].

We here list the persons and classes interested under such will, followed by relationship and other relevant data, together with a descriptive name by which each will be called to facilitate the discussion:

Ida Wilcox Beveridge—"Mrs. Beveridge"—the decedent, died August 1st, 1914.

Philo J. Beveridge—"Husband Beveridge"—husband of Mrs. Beveridge, died May 1st, 1921.

Marian B. Pringle—"Marian"—petitioner, elder daughter of Mrs. Beveridge, living July 25, 1923.

Phyllis B. Brunson — "Phyllis" — petitioner, younger daughter of Mrs. Beveridge, living July 25, 1923.

Note: These two daughters were the only children of decedent.

Amelia Hartwell—"Mother Hartwell"—mother of Mrs. Beveridge, living June 20, 1923.

Madge H. Connell—"Sister Connell"—sister of Mrs. Beveridge, living June 20, 1923.

Children then born or later born to Marian—"Grandchildren by Marian."

Children then born or later born to Phyllis—"Grandchildren by Phyllis".

Issue of Madge H. Connell—"Connell Issue".

Philo J. Beveridge and Madge H. Connell and their successors in trust—"Trustees".

Will of Decedent and Trusts.

The entire estate of the decedent was initially devised and bequeathed to Husband Beveridge and Sister Connell, as trustees. The general trust provisions were limited by special directions in respect to a homestead to be set aside by the trustees and an income for the occupants thereof, creating what we will call, for convenience, the "Homestead Department" of the trust.

In the Homestead Department was to be set aside by the trustees a lot, not to exceed an acre, upon which was to be erected and furnished a residence to cost not over $6,000. The parties who were given the right to reside in the homestead are: Husband Beveridge, Sister Connell, and Mother Hartwell, each for the term of his or her life. Daughters Marian and Phyllis were given a right to live there "during the existence of this trust."

The trustees were given the power, while the trust was in effect, to receive the rents, etc., to sell property (homestead excepted) [Tr. p. 16 *et seq.*], to reinvest proceeds of sale, to distribute income, and in the particular cases hereinafter mentioned, to distribute principal.

In subdivision II [Tr. p. 17] the trustees are directed to use not only income but also proceeds from sales of principal assets to pay "taxes, expenses and repairs" on the trust property; also to provide funds not to exceed

$200 per month "for the support and maintenance of those persons who may reside in said homestead."

The trustees are also directed to use a reasonable sum—without any clear designation of, but without any limitation in respect to, the source of the money—for the education, clothing and maintenance of the children of the decedent.

Net income, if any, in excess of the above-mentioned requirements was to be "divided quarterly between my children, at majority, and thereafter as received."

The general provisions for termination and the takers on termination differ from those applicable to the homestead.

Termination of Homestead Department and Takers on Termination.

The will provides, at transcript, page 18:

> "The trust created with respect to the said homestead is to terminate when my said sister, and my said husband shall both die, and thereupon fee simple title to said property shall descend to my heirs."

Termination and Takers of Corpus-Homestead Excepted.

Subdivision III [Tr. p. 18] fixes the date of termination as twenty-five years after the date of birth of the youngest child (Phyllis), with provisions for earlier termination in case of prior deaths. Both daughters survived, Phyllis attaining the age of 25 on July 25, 1923 [Tr. p. 22].

Subdivisions IV [Tr. p. 18] and V [Tr. p. 19] designate the takers of the trust assets on termination. These subdivisions follow:

IV.

"Upon the expiration of the said trust, the property so devised in trust, except the said homestead, shall descend to and be distributed among such of my children as shall be living at the expiration of said trust, share and share alike; provided, however, if any child of mine shall have died, leaving child or children surviving, such child or children shall take the share which the deceased parent would have taken if then living. And provided, further, that if my said husband shall be living at the expiration of the said trust, the whole of said property shall be charged with the payment of two hundred dollars ($200) per month during his life, for his maintenance and support, which said charge shall be a lien upon the whole of said property so distributed, and shall be paid quarterly."

V.

"Should all of my children die before reaching the end of the said period leaving no issue them or either of them surviving, then it is my will that the whole of said property shall be and become the property of my said sister and of my said husband, share and share alike, if they shall both be living at that time; and if my husband be not living at that time, then it is my will that the whole of said property shall be and become the property of my sister; and if my husband be then living, and my sister be then dead, leaving children her surviving, then the property is to be divided one-half to my husband, and one-half to the said children of my sister; and if my husband shall then be living and my sister

then be dead leaving no issue her surviving, then the said one-half of my said property shall be and become the property of my said husband, and the other half shall go to my heirs."

It thus appears that on termination of the trust, the trust assets (homestead excepted), if any, then remaining, in whatever form they might be—either original or substituted resulting from sales and reinvestments—would be taken, subject to the lien of the $200 per month annuity of Husband Beveridge, by the issue of Mrs. Beveridge, if any, living at the time of termination, such issue to take per stirpes. *Survival on date of termination was a condition precedent to taking;* that is to say, Marian would not take if not then living, nor would grandchildren by Marian take if not then living, nor would Phyllis, if not then living, nor would grandchildren by Phyllis, if not then living.

In absence of then living issue of Mrs. Beveridge, the taker or takers on termination would be found among Husband Beveridge, Sister Connell, the Connell issue, and the heirs of Mrs. Beveridge, the survival of the taker being a condition precedent to his or her taking under certain contingencies and in others it is not.

Elimination of Adverse Interests and Distribution of Estate.

Husband Beveridge died in 1921. Under his will [Tr. p. 22] Marian and Phyllis succeeded to his interest in the homestead.

The Board finds that: "On June 30, 1923, Madge H. Connell, sister of the decedent, and Amelia J. Hartwell,

mother of the decedent, 'for a valuable consideration,' transferred and quit claimed to the two petitioners, all their homestead and other rights under the will of the decedent." [Tr. p. 22.]

All adverse interests and claims against the trust estate were removed or were vested in Marian and Phyllis by virtue of (a) the survival of Marian and Phyllis on the latter's twenty-fifth birthday, (b) the death of Husband Beveridge, terminating his right to a lien for an annuity at the rate of $200 per month, (c) his will, and (d) the transfer by Sister Connell and Mother Hartwell, with the result that the entire estate of the decedent was distributed to Marian and Phyllis by order of court [Tr. p. 22] on July 26, 1923, one day after Phyllis attained her twenty-fifth year, the estate having been held in probate during the period up to that date.

The record discloses no reason for this delay in distribution, but it is of no consequence, since in California no title passes to the administrator or executor.

Brenham v. Story, 39 Cal. 179;
Martinovish v. Marsicano, 137 Cal. 354.

Property Sold and Hereinafter Denominated as the Hollywood Lots.

It appears from the findings [Tr. p. 23] that the property, the sale of which gives rise to the controversy here, consisted of 17 lots in one tract and 3 in another, all located in Hollywood, Los Angeles, California, and being a *part* of the land inherited by petitioners. To distinguish these lots from other parts of the estate, we will call them the "Hollywood lots".

SPECIFICATION OF ERRORS.

Since petitions to review of this nature are not referred to in Rule 24, paragraph 2, subdivision (b), we are attempting compliance as nearly as may be, by inserting in full our assignments of error as they appear in our petition at transcript, page 29 *et seq.* While, as a precautionary measure, certain of the assignments were stated conversely and various of them overlap various others, in effect they operate in the ultimate analysis to specify that the Board erred in its ultimate conclusion, as well as in the reasoning upon which such conclusion was based, that petitioners acquired said realty within the meaning of said section 202 in 1914 rather than in 1923. The errors relied on by each petitioner are, therefore, set out separately and particularly as follows, to-wit:

1. The Board of Tax Appeals erred as a matter of law in ordering and deciding that there was a deficiency for the year 1923.

2. The Board of Tax Appeals erred in not deciding and ordering that there was no deficiency against the petitioner for the year 1923.

3. The Board of Tax Appeals erred in its decision and determination that at the death of the decedent, Ida Wiicox Beveridge, this petitioner "acquired" the property within the meaning of the revenue act.

4. The Board of Tax Appeals erred in its decision and determination that the respondent did not err in using the value of the property at the date of the death of decedent, Ida Wilcox Beveridge, as the basis for the computation of gain derived by petitioner upon the sale of the property.

5. The Board of Tax Appeals erred in its decision and determination that from a reading of the will it is clear that the decedent did not intend to vest in the trustees any interest except the legal title to the property, to hold in trust for the beneficiaries.

6. The Board of Tax Appeals erred in its decision and determination that, clearly, the interest which the petitioner obtained upon the death of the decedent was not a remainder, and that her interest under the trust was not dependent on a precedent estate.

7. The Board of Tax Appeals erred in its decision and determination that under the laws of California there was a presumption that the property vested in the beneficiaries at the testator's death.

8. The Board of Tax Appeals erred in its decision and determination that in the instant proceeding legal title to the property in question vested immediately upon the death of the decedent in the trustees by virtue of the provisions of decedent's will.

9. The Board of Tax Appeals erred in its determination that the petitioner acquired the said realty within the meaning of the Revenue Act of 1921 on July 25th, 1923.

10. The Board of Tax Appeals erred in its failure and refusal to determine that the petitioner acquired the said realty within the meaning of the Revenue Act of 1921 on August 7th, 1914.

11. The Board of Tax Appeals erred in refusing and failing to determine that the basis of said realty for the

computation of gain derived or the loss sustained by petitioner upon the sale thereof, was its value on July 25th, 1923.

12. The Board of Tax Appeals erred in determining that the basis of said realty for the computation of gain derived or the loss sustained by petitioner upon the sale thereof was its value on August 7th, 1914.

HOMESTEAD DEEMED EXCEPTED.

Since the balance of this brief will be devoted mainly to the general trust provisions, we ask the court and counsel to assume that the language hereinafter contained, insofar as it refers to the trust provisions and trust assets, shall at all places be deemed to have excepted the Homestead Department save where the same is expressly mentioned. Such assumption is asked to promote brevity and eliminate, throughout this brief, numerous interjections such as "the Homestead Department excepted".

BRIEF OF THE ARGUMENT.

Points of Law.

These will fall into two general classifications, and will be discussed in the following order: First, California law as determining the nature of the estates or rights of the various devisees under the will of Mrs. Beveridge, in respect to the Hollywood lots, and, second, what might be called "income tax law", involving the construction and application of the Internal Revenue Act, to determine when petitioners "acquired" the Hollywood lots within the meaning thereof.

Points Under California Law.

The rights and title to said lots were dependent upon and fixed by California law, under which we submit:

(a) That the will operated to vest in the trustees such title, but only such title, as was required for the execution of the trusts.

(b) That the trustees took in the lots a title in fee simple limited upon a condition subsequent that upon the expiration of the trust the trustees' title to said lots would terminate in the event that they had failed to sell the same or to devote them to prior trust uses during the existence of the trust.

(c) That the devises to the final takers on the termination of the trust were upon conditions precedent.

(d) That none of such devises took effect, nor could any title in the lots vest in any of the persons or classes among whom the final takers might be found, until the performance of such conditions.

(e) That the conditions precedent upon which the lots had been devised to petitioners were not performed until July 25, 1923.

(f) That while, prior to July 25, 1923, petitioners had, as did each other of the numerous possible final takers have, an inchoate right, a mere expectancy, none of them possessed an estate or title of any nature in said lots.

(g) That when the devise to them became effective in 1923, petitioners did not claim or take the lots in question as the successors in interest of, or under, or through, the trustees, or as beneficiaries of the trust, but that in 1923 they took title solely under, and by virtue of, the conditional devise in said will.

Nature and Extent of Trustees' Title.

Provisions of the California Civil Code applicable are as follows:

> "Sec. 863. Trustees of express trusts to have whole estate. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.
>
> "Sec. 866. Interests remaining in grantor of express trust. Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors."

Our Supreme Court has held that section 863 is limited by section 866, and that a trustee takes only such estate as is required for the execution of the trust.

To this effect see quotation involving a testamentary trust from *Estate of Fair* in opinion of Board [Tr. p. 25].

In *Nichols v. Emery* (41 Pac. 1098), 109 Cal. 323, at page 330, construing a deed, it is said:

> "The trustee takes the whole estate necessary for the purposes of the trust. All else remains in the grantor."

In respect to testamentary trustees, the court, in *Estate of Blake* (108 Pac. 287), 157 Cal. 448, at page 460, says:

> "The trustees simply took the legal title to the trust property to the extent that it was necessary for the fulfillment of their trust duties."

What estate in the Beveridge trustees was "necessary" or "required" for the trust purposes? That estate, whatever it was, but nothing more, vested in them under the devise.

They, of necessity, took the estate required for the execution of those parts of the trusts set up for the individual beneficiaries, a resume of whose rights is as follows:

(a) Homestead rights in Husband Beveridge, Mother Hartwell, Sister Connell, Marian and Phyllis.

(b) Rights in the above-named parties to have the income and proceeds of sale of capital used to pay "taxes, expenses and repairs" on the homestead.

(c) Rights in the above-named parties to have the income and proceeds of sale of capital used to pay up to $200 per month for their support while residing in the homestead.

(d) Rights in Marian and Phyllis to a reasonable sum for "education, clothing and maintenance".

(e) Rights in Marian and Phyllis to excess income, if any, commencing with and following majority.

It is to be noted that petitioners took as *beneficiaries* of the trust or *under* the trustees nothing whatever save as above summarized.

The trust being one "to sell" [Tr. p. 16], the Beveridge trustees also took a fee simple title limited upon the condition subsequent hereinafter set out. In the event of purchase, the buyer would take and have a full and unconditional fee, claiming under the trustees and by virtue of the trustees' sole grant. Joinder by any or all of those who might otherwise have ultimately taken the realty was not essential. A fee title during the existence of the trust was "necessary" and was "required" for the trust purposes.

It may, therefore, be properly said that the trustees took a full fee limited upon a condition subsequent that unless they had conveyed to a purchaser prior thereto, their title would expire upon the happening of the event operating to terminate the trust.

The California Civil Code contains the following two sections:

> "Sec. 707. Fixing the time of enjoyment. The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case, the enjoyment is said to be upon condition.
>
> "Sec. 708. Conditions. Conditions are precedent or subsequent. The former fix the beginning, the latter the ending, of the right."

In the California Civil Code, prior to the amendments of the year 1931, appeared the following sections:

> "Sec. 1345. Conditional devises and bequests. A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.
>
> "Sec. 1349. Conditions subsequent, what. A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event."

The devise in fee to the Beveridge trustees depended upon the occurrence of an uncertain event, namely, a sale of the property prior to the termination of the trust. Their failure to sell operated to divest them of the fee on the date of termination.

Incidents of Futue Interests and Rights of Final Takers.

It is to be noted that the final takers did not take under or through the trustees, as the Board apparently assumed they did. The trust was not one "to convey". Such a trust prior to the 1913 amendment of section 857 of the Civil Code would have been void under the doctrine set out in the *Estate of Fair* (64 Pac. 1000, 132 Cal. 523, where it is said, at page 527:

> "In determining whether or not the trusts declared in the fifteenth clause are valid, the primary and most important consideration is that an express *trust to convey* real property to beneficiaries is not lawful under the statutes of this state, but is by such statutes forbidden."

The directions to the trustees in the *Fair Estate* were to "transfer and convey" the trust property to final takers. The will in the instant case avoided the vitiating effect of the decision in the Fair case by providing that on the termination the property remaining "shall descend to and be distributed among" or shall be taken by [Par. IV, Tr. p. 18], or "shall be and become the property of" or "shall be divided between" or "shall go to" [Par. V, Tr. p. 19].

The foregoing provisions operated as conditional devises under which the final taker would claim upon the expiration of the trust. No transfer or conveyance to them by the trustees was necessary or required. (See quotation hereinafter contained from *Estate of Blake,* 157 Cal. 448, directly so holding, in the testamentary trust there involved.)

The devise, however, did *not* operate to vest forthwith in the numerous individuals and classes, among whom the final takers might be found, any title in the realty, since the devise to them was upon conditions precedent. Each acquired under the devise an inchoate right, a mere expectancy—not an estate or interest in the realty—which might, under certain contingencies and upon the termination of the trust, attain the dignity of a title in any one or in more than one of the numerous individuals and classes.

In the California Civil Code, in effect prior to the amendments of 1931, were the following sections:

> "Sec. 1345. Conditional devises and bequests. A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

"Sec. 1346. Condition precedent, what. A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.

"Sec. 1347. Effect of condition precedent. Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled, except where such fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will."

Save for the devise to the trustees and the homestead devise, each and every devise contained in the will of Mrs. Beveridge depended upon the occurrence "of some uncertain event, by which it" was "to take effect". The conditions were precedent with the effect that "nothing vests until the conditions are fulfilled".

As to each and every parcel of realty left by Mrs. Beveridge, its disposition to the final takers under subdivisions IV and V of the will [Tr. pp. 18 and 19] depended upon an uncertain event, namely, the presence at termination of such parcel in the hands of the trustees not chosen by them as the homestead and not sold by them. The trustees might have sold such parcel, or they might have allocated the whole or a part thereof to the Homestead Department, in either of which events such parcel would not pass under, or in anywise be affected by, the devises in subdivisions IV and V.

Furthermore, the gift to the persons and classes, eight in number, designated as final takers, depended upon some

future uncertain event or events, namely, survival, birth or death, as a condition precedent to taking, for examples:

Daughter Marian would take nothing unless she survived.

Grandchildren by Marian, who would take nothing unless Marian had died, must themselves have been born, and must have been living at the termination of the trust.

Husband Beveridge and Sister Connell would take nothing in absence of the deaths, prior to termination, of daughters Marian and Phyllis and their respective issue, if any, and so on.

Daughters Marian and Phyllis, the petitioners, ultimately acquired title to the particular realty involved in this case under the devise upon conditions precedent contained in subdivision IV in the will which were not performed until July 24, 1923. Until that date the devise did not take effect and nothing vested (C. C., secs. 1346-1347, quoted *supra.*)

Estate of Blake Controlling.

Various of our points in respect to the conditional and contingent nature of petitioners' future interests are squarely and clearly sustained by the well-considered opinion in the *Estate of Blake,* 157 Cal. 448 (108 Pac. 287), decided by the Supreme Court in bank. In fact it is a rarity in a contested case to find a decision "on all fours" as is this one. Since this is the only additional authority which we will use on the California law, and since the opinion covers 24 pages, many of which treat points not material here, we will devote considerable space

to the facts and quotations, limiting the same, however, strictly to passages which are relevant here. We have run the *Shepard California Citator* to date on this case, finding numerous citations, but none on the instant points save *Estate of Whitney* (167 Pac. 399, 176 Cal. 12, where, at page 22, *Estate of Blake* is cited with approval on the subject of contingent remainders.

In *Estate of Blake* (108 Pac. 287), 157 Cal. 448, the testamentary disposition (quoted from page 452) was as follows:

> "After the payments of the bequests enumerated in article III, I direct my said executrix, executors and trustees to convert the rest and residue of my personal estate, if any there be, into money, and to invest the same in improved real property, and to hold all the rest and residue of my estate and pay over the net income therefrom in equal proportions quarterly to my said daughters, Alice S. Blake and Nellie F. Witcher, and my granddaughter, Ethel Pomroy, until they shall respectively arrive at the age of thirty years, and as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive one-third of the rest and residue of my said estate as her distributive share thereof, and to have and hold the same to her and her heirs forever, *and if either of my said daughters or granddaughter shall die without issue and before she receives her distributive share of my estate, it is my desire that her share of my said estate shall go to the surviving daughter, daughters or granddaughter as the case may be, share and share alike.*"

The estate having been distributed in accordance with the will, the controversy arose many years later in respect to the one-third of the corpus to be taken by the granddaughter Ethel Pomroy (hereinafter called "Ethel") as she attained the age of thirty years. Ethel was nine years old at the date of the death of the testator. She died intestate in her twenty-eighth year, leaving as her heirs her husband, one Soule, and two minor children. The controversy was three-cornered.

The two daughters of the testator contended that the testator had died intestate in respect to the future interest in the Ethel third, since the will made no express disposition thereof in case Ethel should die *with* issue.

Soule, as administrator of Ethel's estate, contended that the Ethel future interest constituted a vested remainder which passed to her heirs, of whom he was one.

The contention of the guardian of Ethel's children is stated at page 455, as follows:

> "On behalf of the surviving minor children it is insisted that even if the contingency by which their mother was to take the corpus of the estate—the attainment of the age of thirty years—did not happen and the fee of the property therefore never vested in her, still the testator did not fail to dispose of the trust property, but, on the contrary, they insist that the trust clause providing for a devise over on the death of their mother *'without issue* and before she received her distributive share' was a devise by implication to them of such corpus as her issue; that even if the devise failed to vest in fee in their mother, they took the property as donees or purchasers under the will itself as a devise in their favor. * * *"

The court rejected the intestacy theory, holding with the guardian, that there was a devise by implication of the Ethel third to her issue, if any, in the event of her death under 30 years of age. This subject occupying much space is of no interest in the instant cases.

However, the portions of the opinion disposing of the conflicting claims between Soule, as administrator, on the one hand, and the guardian of his children, on the other, in which the nature of Ethel's rights were adjudicated, are directly in point. Since the dispute was over the identity of the final takers of the assets in their condition as released from the trust upon the expiration of the trustees' estate therein, the court, in dealing with the problem, was concerned only to classify the interim rights of the final takers to whatever might remain. These they classified as contingent remainders, arising as they did under conditional devises dependent only upon survival on the one hand or birth on the other, as conditions precedent to taking. No question was raised for direct adjudication similar to the additional point which we make in the instant case, namely, that in respect to the Hollywood lots as such, independent of the conglomeration of final assets, the rights of petitioners were further conditioned upon the presence of these lots in the corpus of the trust upon the termination date. Although our point in this respect was not directly adjudicated, it finds support in the various principles which were laid down, and which were necessary to the decision, in the *Estate of Blake*.

The contention of Soule in the *Blake* case is stated in greater detail at pages 454-55 as follows:

"As far as the appellant—the administrator of the estate of Ethel Pomroy Soule—is concerned, it is insisted that under the will and decree devising and distributing the trust property to the trustees there was vested immediately in Ethel Pomroy on the death of the testator a remainder in fee in said property (possession only being deferred) defeasible only upon a condition subsequent—namely, her death 'without issue and before she received her distributive share' (attaining the age of thirty years), the happening of which has now become impossible, and that on her death the *corpus* of the trust property passed to her heirs in fee simple"

In disposing of this contention, the court, at page 458, says, in part:

"Counsel on both sides in support of their respective positions have brought to their aid much of the abstruse learning which has been devoted to the subject of remainders. There is no subject in the law to which more refinement of learning has been applied, nor one where, particularly in ascertaining whether a remainder is a contingent or vested one, more nice, technical, and shadowy rules of construction have been formulated. * * * As to these rules, however, it may be said that there are none of them which may be taken as an unvarying standard by which the meaning or intent of all testamentary devises in remainder may be construed. * * * They are simply subordinate rules of construction which are applied only in the absence of all other indications in the will to the contrary and in support of an intention on the part of the testator to create a vested remainder."

Further, at page 459:

"Now, coming to a consideration of the terms of the trust itself, we think that the language of the testator, given its legal import, clearly shows that only a contingent remainder was devised to Ethel Pomroy and that as far as that question is concerned the trial court properly so held.

"There can be no question as to the rule relative to contingent and vested remainders and the difference between them. The difficulties which have filled the books with dissertations on the subject have arisen in an endeavor to determine from indefinite terms of devise to which class the remainder belongs. The general rule is that where the legacy or devise is given to a person to be paid at a future time, it vests immediately. When, however, it is not given until a future time it is contingent and does not vest until that time occurs. As said in the note to Goebel v. Wolf, 113 N. Y. 405 (10 Am. St. Rep. 470, 21 N. E. 388), quoted approvingly by this court in *In re* Rogers, 94 Cal. 526, 530 (29 Pac. 962): 'The leading inquiry upon which the question of vesting or not vesting turns is, whether the gift is immediate, and the time of payment or of enjoyment only postponed, *or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person, or the like.* * * * According to the prevailing doctrine, a postponement of the time of payment will not of itself make a legacy contingent unless it be annexed to the substance of the gift; or, as it is sometimes put, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened. Thus, where the legacy is given, payable or to be paid when the legatee attains the age of

twenty-one years, the legacy vests immediately upon the death of the testator. It is a present gift, the time of payment only being postponed; but where the time is annexed, not to the payment only, but to the gift itself—as when the legacy is given to the legatee at twenty-one, or "if" or "when" he attains the age of twenty-one—the legacy does not vest until the legatee attains that age. His attaining the age specified is a condition precedent; and if the condition be not fulfilled the legacy never vests.'

"Examining the trust provisions of the will under this clear distinction between vested and contingent remainders, and giving to the language used by the testator its proper legal import, *we perceive no room for question but that the attainment of the age of thirty years by the beneficiary, Ethel Pomeroy, was made a condition precedent to the vesting of the corpus of the trust property in her, both in title and possession, and, hence, the devise was of a contingent remainder.*

"This conclusion reasonably follows, whether we look at the provisions of the trust separately or view them collectively. The testator had devised the legal title in the trust property to his trustees and in the first portion of the trust clause, as far as the beneficiaries, including Ethel Pomroy, are concerned, provided only for the payment to them of the net income of the estate in equal proportions 'until they shall respectively arrive at the age of thirty years.' The meaning of this provision is plain. *The trustees simply took the legal title to the trust property to the extent that it was necessary for the fulfillment of their trust duties. There is nothing in it whereby any title was passed to the beneficiaries.* An express trust to be exercised for the purpose of conveying

title to the beneficiaries would have been void (Estate of Fair, 132 Cal. 523 (84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac. 1008); Estate of Dunphy, 147 Cal. 95 (81 Pac. 315)), and an implied trust would have been equally illegal, as what the testator could not do directly he could not do indirectly or effect by implication, so that unless the other provisions of the will give it, *it is quite apparent that none of the beneficiaries would have taken any interest in the corpus of the trust property.* Now the only language in the will which can be insisted upon as giving them any interest in the trust property is found immediately following the provision as to the payment of the *interim* income, namely, 'and as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive one-third of the rest and residue of my said estate as her distributive share thereof, to have and to hold the same to her and her heirs forever.' This is the only clause in the will wherein the testator attempted to make a gift of the *corpus* of the trust property to the beneficiaries, and the gift springs from the right given 'to demand and receive' one-third of the residue 'as each arrives at the age of thirty years.'" (Italics ours.)

After devoting considerable space to justify the conclusion that the words "she shall have the right to demand and receive . . . and to have and to hold the same," etc., "forever" are adequate, the opinion, at page 464, proceeds:

"Aside from these considerations addressed particularly to the devising clause of the will which, of itself, satisfies us that the devise to Ethel Pomroy was of a contingent remainder, this conclusion is

further supported by the devise over. While there is a conflict in the authorities elsewhere as to the effect of a devise over in determining whether a remainder which is not fixed by direct words of devise is contingent or vested, the matter in this state is settled.

"In the case of *In re Rogers* (94 Cal. 526), heretofore referred to, the testator had bequeathed to his grandson a legacy of ten thousand dollars to be paid in certain proportions and as he attained certain years of age; the first payment to be made when he attained fifteen, the final payment when he reached twenty-five. The clause in the will making this bequest provided further that 'if my said grandson die before arriving at the ages herein named, then the remaining or unpaid amounts of said bequests, together with the income thereon, I direct shall be distributed . . . to the brother and sisters of myself and wife . . . share and share alike'. During the administration of the estate the grandson died at the age of six or seven years and before any of the bequests were payable to him. On distribution of the estate his mother applied for payment of the legacy to her as his heir at law under the claim that the bequests to her son vested in him on the death of the testator, asserting that a bequest 'payable' or 'to be paid' to a person 'at' or 'when' he shall attain the age, etc., vests the estate immediately in him and his interest is transmissible to his representatives. The question squarely before the court in that case was whether the legacy was vested or contingent. It was held to be contingent and, in reaching that conclusion, the court took into consideration the devise over and said: 'If the last clause (the devise over) had been omitted, it might no doubt

be successfully claimed that there was a present and absolute bequest, the times of payment only being deferred, and that it vested in the legatee on the death of the testator. That clause, however, makes it clear, we think, that the intention was not to make an absolute bequest, but a conditional one to take effect only if the legatee should reach the ages named for its payment.' Hence, in this state the rule is that a devise over is to be construed as indicating an intention on the part of the testator not to make a vested devise, and applied to the devise here in question, imparts additional force to the conclusion which we think apparent from the language of the devise itself that only a contingent devise was made to Ethel Pomroy; that it was only to take effect in title and possession on the condition of her attaining the age of thirty."

Later follows language which rebuts any contention that the stipulation for payment by the Beveridge trustees of part of the income to Marian and Phyllis at and after majority is of any consequence, the court saying:

"We are mindful, too, of the rule particularly insisted upon by appellants that where the only gift is in direction to pay and deliver at a future time, or what is asserted to be the equivalent here, the 'right to demand and receive' at a future time, and the entire *interim* income is given to the beneficiary, a present gift of title to him is presumed to have been intended by the testator. Under this rule appellants insist that from the gift of the entire *interim* income to the beneficiaries here it is to be inferred that the testator intended a present gift of the *corpus* to them and that the right 'to demand and receive' as used by him only applied to the possession of the

corpus, and, therefore, the devise became vested on the death of the testator subject to become divested should any beneficiary die without issue and before obtaining possession of her share of the *corpus*. The general rule at common law is, as asserted by appellants, but without considering other objections which respondents urge against its application to this particular devise, it is at best but a rule of presumption to be indulged in only when there is no other language employed by the testator showing a contrary intention. But, as we have heretofore pointed out, the language actually used by the testator in connection with the right 'to demand and receive', and the other matters in the will to which we have called attention, defines the estate which is to be taken by the beneficiaries in the future under this right as being both title and possession. Futurity applies to both by the express language of the testator so there is no room for indulging in any presumption."

The *Blake* case and the code sections hereinabove cited are conclusive against any contention that petitioners took a vested interest subject to be divested by later events. In the instant case, not only was the gift to each petitioner expressly conditioned upon her survival, but also there was an express gift over, effective should she not survive.

Certain Misconceptions of California Law Inducing Ultimate Conclusion of Board.

Although they had before them, and quoted [Tr. p. 25] from the *Estate of Fair,* the rule that a trustee takes only such title as is required for the execution of the trust, the Board apparently concluded that the full fee title vested in the trustees, and that the petitioners took the

Hollywood lots under and through them as their successors in interest and as beneficiaries of the trust, which, as already pointed out, was not the case. This conclusion is evidenced by the following quotations from the opinion:

> "From a reading of the will it is clear that the decedent did not intend to vest in the trustees any interest except the legal title to the property, to hold in trust for the beneficiaries." [Tr. p. 26.]
>
> "Clearly the interest which the petitioners obtained upon the death of the decedent was not a remainder. Their interest under the trust was not dependent on a precedent estate." [Tr. p. 26.]
>
> ". . . we believe, from a reading of the will, that it was the intention of the decedent that her children should receive a vested interest under the trust immediately upon her death." [Tr. p. 28.]

Second. To sustain the conclusion that petitioners took a vested interest at the testator's death, the Board quotes [Tr. p. 28] section 1341, Civil Code, declaring a presumption to that effect. Such quotation is particularly inapt, immediately following, as it does, the Board's quotation [Tr. p. 27] from *Estate of Blake, supra,* concluding with this sentence:

> "It is true that presumptions are to be indulged in which will prevent intestacy (Le Breton v. Cook, 107 Cal. 410, 40 Pac. 552), and that testamentary devises are presumed to vest at the death of the testator (Civ. Code, sec. 1341); but these presumptions, like the auxiliary rules of construction relied on by appellant, are subordinate to the cardinal rule just stated."

The "cardinal rule just stated" was that in absence of "ambiguity, the language used must be interpreted according to its ordinary meaning and legal import, and the intention of the testator ascertained thereby."

In the *Estate of Blake*, as already appears, the court decided that the future interest did *not* vest on the death of the testator, that its vesting was contingent and conditional and that it never did vest in Ethel Soule, the person initially first in rank as a final taker.

There was no trace of uncertainty or ambiguity in the will of Mrs. Beveridge. She directs what the trustees are to take and what and when and under what conditions the other devisees are to take—all in language so clear that no rules of construction or presumptions are required to ascertain her intent.

Third. The Board [Tr. p. 28] also stresses, to augment the statutory presumption, subdivision VI of the will [Tr. p. 20], providing, in effect, that should the trust be adjudged void, the children of the testator are to take the entire estate.

It is too plain to require argument that the primary and paramount desire of Mrs. Beveridge was to make effective (a) her devise to the trustees benefiting three persons in addition to her children, and (b) her devise to those who on the termination of the trust could qualify as final takers but who might not be her children.

Clause VI merely evidences a secondary scheme effective only if the execution of her primary desire should be frustrated by an adverse adjudication, a desire that her children should then take all, to the end that intestacy

would be avoided and Husband Beveridge should take no part of her estate as an heir.

Fourth. At transcript, page 30, the opinion of the Board states the decree of distribution required the *trustees* to deliver the estate to the beneficiaries. This statement is in error, since it appears from the findings [Tr. p. 22] that the decree was undoubtedly rendered on the first and final account report and petition for distribution filed by the *executrix*.

That California law governs is clearly established.

> "It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. United States v. Crosby, 11 U. S. 7 Cranch, 115 (3: 287); Clark v. Graham, 19 U. S. 6 Wheat. 577 (5: 334); McGoon v. Scales, 76 U. S. 9 Wall, 23 (19: 545); Brine v. Hartford F. Ins. Co., 96 U. S. 627 (24:858)."
>
> *De Vaughn v. Hutchinson,* 165 U. S. 566.

See also:

Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 399;

Crooks v. Harrelson, 282 U. S. 55, 62;

Poe v. Seaborn, 282 U. S. 101, 110.

SECOND GENERAL POINT OF LAW.

Income Tax Law.

BREWSTER V. GAGE DISTINGUISHED.

The Board, laboring as it did under a misapprehension of the California law, based its ultimate conclusion on *Brewster v. Gage,* 280 U. S. 327; 74 L. Ed. 457, which involved the time of "acquisition" of personal property passing under a residuary bequest to a legatee in New York, where, under the common law rule, the executor takes legal title to the personalty. The facts in that case may be distinguished quickly from those in the instant case.

The executor there took and held, during the interim, legal title for the purposes of administration and as trustee for the legatee. Upon the death of the testator, the equitable title at once vested in the legatee who ultimately took legal title under and through a transfer from the trustee, made in the performance of the trustee's trust obligations as trustee for the legatee. The trust was one to administer and transfer to the legatee legal title in what remained. The bequest was unconditional and the rights of the legatee vested instantly. There were no conditions precedent to be complied with by the legatee to make the bequest effective. The vested beneficial interest of the legatee was upon the death of the testator instantly subject to alienation and would pass to his heirs or executors. *Not one of these elements was present in our case.*

Petitioners Acquired Property in 1923.

The Act provides that, in determining gain or loss resulting from sale of *property* "acquired" by devise, the basis shall be the fair market value "at the time of such acquisition".

Since until 1923 the appellants had no interest in the realty in question, there was nothing to which a market value could be ascribed in 1914.

What each petitioner took in 1914 was a mere expectancy, a right of no higher rank than that of a California wife in the community property prior to the amendments of 1921, which the decisions of the California courts have consistently held to be a "mere expectancy" and which decisions the United States Supreme Court followed in determining that the California husband and wife might not divide the community income in separate tax returns. In the wife's case, as well as in our case, there was more than a mere hope, but, nevertheless, there was not an interest which could reasonably be considered as even approaching property ownership.

Nor were petitioners' rights in the expectancy exclusive, as was true in the case of a California wife, since here each of the various other possible final takers had an expectancy—an expectancy in each similar to that enjoyed by each of the others, including petitioners, identical in every aspect, save for the varying degrees of rank. However, the preferred rank of any holder in nowise rendered the essential quality or nature of his expectancy different to the quality or nature of the expectancy held by each other possible taker.

Under the Commissioner's theory, if both petitioners had died one day prior to the 25th birthday of daughter Phyllis, then the final takers, whoever they might be and whether or not even born in 1914, would have acquired the realty in 1914—a result which refutes the theory of an acquisition in 1914 by petitioners. One fallacy of this theory is that it looks to conditions in 1923 to determine who acquired the realty in 1914. Certainly, if the appellants "acquired" the realty in 1914, no one else could have done so. Yet, if events had been different, entirely different people would now be charged with having acquired the same land in 1914.

The revenue acts deal with substantial, vested property interests, not with contingent and conditional expectancies.

In *Brewster v. Gage* it could fairly be said that the legatees had substantially acquired the property at decedent's death. Likewise, in the other tax decisions cited in the Board's opinion, there were immediately vested interests in the property which were presently marketable, subject only to postponement of possession. Such other cases represented an extension of the principle laid down by the Supreme Court and are subject to doubt. See, for example, the dissenting opinions in *William Huggett,* 24 B. T. A. 669, now pending on appeal before the Court of Appeals for the District of Columbia. Nevertheless, in each of these cases, the taxpayer received a substantial vested interest in the property immediately upon decedent's demise.

Furthermore, the Treasury Department had consistently ruled in cases involving contingent remainders that the

basis of the property was the fair market value of such rights *at the time they vested.*

In Solicitor's Opinion 35, 3 Cum. Bull. 50 (1920), the position of the Department in respect to vested remainders was stated as follows:

> "The only difference between the subject matter disposed of by sale in behalf of the children after the death of the life tenant and that acquired by them on the death of testator is that the former carried with it the actual possession of the property and the latter did not. Notwithstanding this fact, however, the right to the possession *vested* in the children at the death of the testator; the enjoyment alone was postponed to the death of the life tenant. *Likewise, all the rights which the children acquired with respect to the land vested at the death of the testator and were as perfect then as at the death of the life tenant. Scofield et al. v. Olcott et al.* (Ill.), 11 N. E. 351, 352; *Nichols v. Levy,* 5 Wall. 433, 442-3. It is believed, therefore, that the remainder acquired by the children on the death of the testator is essentially the same property as the fee simple sold in their behalf after the death of the life tenant."

(The italics in the above and following quotations have been supplied by us.)

See also Income Tax (Ruling) 1622, II—1 C. B. 135 (1923) to the same effect.

Since the Supreme Court had held in *Brewster v. Gage* that the Department's continuous interpretation of this provision of the law in respect to unconditional bequests, followed as it was by subsequent re-enactments

without change, was to be given considerable weight, it is not surprising that the Board and the courts have followed these rulings. Certainly, in the present case, we have no quarrel to make with these rulings or decisions, since they involve presently vested estates and interests in the title to property.

We have yet to find, however, a decision by the Board or of a court, holding that a contingent remainder or other expectancy is an interest of such substance that it may be treated as ownership or "acquisition" of property. Furthermore, we have been unable to find a single ruling by the Treasury Department which has so interpreted the revenue acts. On the contrary, it has consistently and continuously taken the contrary position.

In Office Decision 727, 3 Cum. Bull. 53 (December, 1920), the Department made an express ruling on the question as follows:

> "Section 202, Article 1562: Sale of property acquired by gift or bequest.
>
> "Where in a bequest of property the remaindermen have only a *contingent interest* prior to the death of the life tenant, *the basis* for determining gain or loss from a sale of such property by the remaindermen *is its value as of the death of the life tenant.*"

Again, in Solicitor's Memorandum 4640, V—1 C. B. 60 (January, 1926), held that "a person having only a contingent interest in property sustains no deductible loss by reason of destruction of the property by fire", drawing a sharp distinction between "vested" and "contingent" remainders.

In a very recent ruling by the General Counsel, G. C. M. 10260, XI—1 C. B. 79 (March, 1932), a similar question was presented. The will of a testator who died in 1880, left certain property in trust to her daughter "A" during her natural life; and in trust further if the daughter should die leaving lawful issue, to said issue share and share alike, until the youngest should reach the age of 21; but if the daughter should die leaving no lawful issue living, or if said issue should all die before the youngest should reach the age of 21, then the property should go into the residuary estate. "A" died in 1926, leaving seven children living, all of whom had then attained the age of 21 years, and the property was delivered to them. In determining the basis of the property to said issue, the General Counsel said in part (p. 80):

> "The first question is whether the children of A (the grandchildren of the testatrix) 'acquired' the property before March 1, 1913. It is concluded that the answer is in the negative, and for two reasons: First, there is no evidence that all of the grandchildren were in being prior to that date, and any person not yet in being obviously could not acquire property; in the second place, their interests were wholly contingent under the law of Pennsylvania until the death of their mother in 1926 (*In re Adams' Estate,* 208 Pa. 500, 57 Atl. 979; *In re Alburger's Estate,* 274 Pa. 15, 117 Atl. 452); and *the position of this office has been that one who has a mere contingent interest does not 'acquire' the property in question until his interest becomes vested.* (O. D. 727, C. B. 3, 53; S. M. 4640, C. B. V—1, 60.) (See also I. T. 1622, C. B. II—1, 135; S. O. 35, C. B. 3, 50.)"

It will be noted that the interests there in question were contingent remainders under the applicable state law; and further that the General Counsel cites, with approval rulings dating back to 1920 as showing the consistent interpretation of the Treasury Department to the effect that the owner of a contingent interest does not "acquire" the property, within the meaning of the Revenue Acts, *until his interest becomes vested.*

Again, at page 96, the General Counsel said:

> *"Contingent beneficiaries or remaindermen are not regarded as having 'acquired' property under the Revenue Acts,* and, consequently, in such cases 'distribution' as well as acquisition, is necessarily contingent until substantial ownership vests, at which time distribution to them is automatically concluded."

The Treasury Department having consistently ruled under all the revenue acts that a contingent remainderman does not "acquire" the property until his interest becomes *vested,* we do not believe the action of the Department in the present cases represents an intended departure from this interpretation of the revenue law, but that it arises solely from a misconception of the California law and a failure to thoroughly and properly analyze the will of Mrs. Beveridge. In other words, we believe that the Department has heretofore labored under the same errors which are manifested throughout the decision of the Board.

Even in absence of such rulings by the Department, we are unable to conceive any principle of law or reason which may be successfully advanced to sustain a conclusion that petitioners *acquired* the Hollywood lots in

1914 under the devise of the reversionary estate in property, the fee to which had passed to the trustees upon a condition subsequent—a devise never effective until the performance of the prescribed conditions precedent—a devise under which no estate or title to property was *acquired* by any one until 1923—a devise under which petitioners along with many others, enjoyed during the interim, a mere expectancy of possible *future acquisition*—a devise under which petitioners might have *acquired* nothing—a devise under which petitioners did in 1923 *acquire* certain realty, the *acquisition* and *sale* of which gave rise to the instant cases.

We, therefore, submit that since the Board expressly found no increment in value between July 25, 1923 and the respective dates of sales, the deficiencies in question were erroneously asserted.

Respectfully submitted,

Raymond W. Stephens,

Joseph D. Peeler,

Attorneys for Petitioners.